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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 531

PEORIA HOUSING AUTHORITY,

Petitioner,

vs.

SECURITY INSURANCE COMPANY, [illegible] AND MAX EDLIN AND IDA EDLIN,

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX.

Opinion .....
Jurisdiction .....
Question Presented .....
Statutes Involved .....
Statement .....
Argument .....
Conclusion .....

CITATIONS.

Court Rules.

Supreme Court of the United States, Rule 19 .....

Texts.

50 Am. Jur., Subrogation, Sec. 10 .....
I. R. S., 1951, Chap. 110, Sec. 176 .....
St. Louis Daily Record, Sept. 8, 1949, p. 1 .....

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OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit (App. A of Petition) is reported at 269 F. 2d 159. The opinion of the United States District Court for the Southern District of Illinois is found at 160 F. Supp. 487.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

The "question presented" is fairly stated under that heading in the Petition.

STATUTES INVOLVED.

While there is no statute which directly controls this case the opinion of the Court of Appeals refers to Section 10, Ch. 47, Ill. R. S., 1951, and Section 8, Ch. 67½, Ill. R. S., 1951 (App. C of Petition). Additionally, Respondent will cite Section 176, Ch. 110, Ill. R. S., 1951.

STATEMENT.

Petitioner's statement fairly presents the facts necessary for a determination of this cause. In addition to the facts stated, Respondent here sets forth the undisputed fact that at the time of the fire which destroyed Edlins' building, there was pending an undisposed Motion to Dismiss the Eminent Domain proceeding in the Peoria County Court. This motion was not denied until after the fire (App. 37).

Respondent criticizes and takes issue with the argumentative portion of Petitioner's "Statement", particularly the following:

> "The Court of Appeals, without mention or consideration of the equitable principles urged upon it, permitted the Edlins to recover on the policies, * * *" (Petition, p. 4).

ARGUMENT.

The issue as to this Petitioner is singularly narrow. It presents only the question as to whether or not the Court of Appeals correctly applied the doctrine of equitable subrogation to the particular facts. No amount of argument, expansion or conclusion, can be used to broaden the issue herein presented to warrant review by this Court. In fact, Petitioner has not even attempted to set forth grounds, either express or implied, which bring this case within the language of Rule 19 of this Court.

There is no citation or statement in the petition which asserts that the instant decision is in conflict with the decision of another Court of Appeals on the same matter; nor is it claimed that the decision conflicts or offends the applicable law of the State of Illinois; nor is it urged that a question of federal law is involved; nor is it contended that the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to invoke this Court's supervision. The Petition is nothing more than a restatement of the arguments presented to the Court of Appeals in Petitioner's Brief and its Petition for Rehearing. A mere claim of erroneous application of purely local rules of decision.

I.

THE DECISION OF THE COURT OF APPEALS IS CLEARLY CORRECT.

Petitioner does now and has throughout this litigation based its position generally on the principle of restitution and specifically on equitable subrogation. In its petition (p. 5) Housing quotes from 83 C. J. S., pp. 590-591. It then bases its argument on that abstract statement of law.

We quote as follows from 50 Am. Jur. 688, Subrogation, Section 10:

> "Subrogation is a consequence which equity attaches to certain conditions. It is not an absolute right, but one which depends upon the equities and attending facts and circumstances of each case. There are, however, certain elements which must be present in every case in which legal subrogation is sought. *In the first place there must be a debt or obligation for which parties other than the subrogee are primarily liable, and* which he as surety, guarantor, or in some other capacity discharges for the protection of his own rights or interests, *or* to the payment of which the funds of the person seeking subrogation have been wrongfully applied, or from the payment of which a third person receives a benefit." (Emphasis ours.)

Or, as otherwise stated, three elements *must* be present before the doctrine applies:

(a) There must be a primary debt or obligation, and

(b) Said obligation must be paid by a person other than the original obligor, and

(c) The person so paying must do so in a capacity other than as a volunteer.

The facts in this case clearly indicate that Petitioner fails to meet any of the conditions. The only obligation created by the fire was on the Insurance Companies; the amount of the jury's condemnation award would have been the same regardless of the fire. Housing was not in any worse position by reason of the fire than it would have been had the fire not occurred. It is undisputed that what Petitioner wanted was Respondents' land and not their buildings. In fact, it can be inferred from the record that Housing gained to the extent that it saved razing costs to the extent of destruction by fire.

In the "Statement" mild objection was made to that

argumentive portion of the Statement in the Petition to the effect that the Court of Appeals gave no consideration to the equitable principles raised. The reference in the opinion

> "Moreover, after the fire, the Authority had a right to abandon the proceeding, under § 10, Ch. 47, R. S. Ill. 1951. This it failed to do. If it had done so, it would not be in its present situation." (App. A of Petition, p. 19.)

necessarily refers to that principle of subrogation which requires that he who seeks subrogation must have acted other than as a volunteer. Reference to Illinois Statutory procedure in this respect came up in the oral arguments in the Court of Appeals. At that time counsel for the Respondent suggested that under applicable Illinois procedure Petitioner could, immediately after the fire, have moved for dismissal of the cause, without prejudice, and re-filed its complaint, thereby establishing a new valuation date and that failure to do so was some evidence that it *voluntarily* established its own valuation date prior to the fire. During Petitioner's time for oral argument, Judge Schnackenberg, who wrote the opinion in this case, asked counsel if this could not have been done. Counsel then, as now urged in this petition, argued that a great many tracts were involved and that the expense of such a procedure would have been prohibitive. Upon further questioning by the Court, it was conceded that in all probability dismissal could have been had as to Respondents' tract only. Though this colloquy probably does not appear in the record now before this Court, Petitioner's counsel at that time (not the same attorney as on this Petition) would have to concede these facts. Respondents bring this out because it is necessary to meet the inferential argument that the Court of Appeals gave no consideration to equit-

able principles and also as stated on page 7 of the Petition that:

> "None of those propositions were ever raised in defense to the Authority's claim. * * *"

Petitioner at pages 9, 10, 11 and 12 of its Petition seems to be confusing the legal effect of a voluntary dismissal before verdict and an abandonment of the proceeding after verdict. It indicates that had it abandoned the proceedings, it would be barred from further proceedings, thereby dissipating public funds. Perhaps this would be the case had it waited until after the jury verdict. However, a voluntary dismissal without prejudice, as to the Edlin tract only, after the fire but before verdict would not have prevented the commencement of a new action. This right is conferred by Sec. 10, Chap. 47, Illinois Revised Statutes 1951 (cited by the Court in its opinion) and also by Sec. 176, Chap. 110, Illinois Revised Statutes 1951, to-wit:

> "The plaintiff may at any time before trial, or hearing begins, upon notice to the defendant or his attorney, and on the payment of costs, dismiss his action or any part thereof as to such defendant, without prejudice, by order filed in the cause."

II.

THERE IS NO IMPORTANT QUESTION INVOLVED.

In an address by Chief Justice Vinson before the American Bar Association, on September 7, 1949, reported in the St. Louis Daily Record (Sept. 8, 1949, p. 1), he in part said:

> "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. * * * If we took every case in which an interesting legal question is raised, or our prima facie impression is that the decision below is

> erroneous, we could not fulfill the constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved."

Petitioner suggests that considerations of public policy and public morals are involved which could affect the administration and expenditure of public funds at all levels of government. This, of course, is the familiar argument of "if this decision is correct, see where it might lead". In this case the argument is based upon a dangerous and fallacious presumption: *viz.*, that property owner citizen of these United States is feloniously inclined, cloaked in moral turpitude, and lean toward that which is dishonest rather than that which is honest.

Even if we do consist of a citizenry of arsonists, the argument fails. This case is unique and singular in its fact situation as well as in the rule of law in Illinois that requires valuation in Eminent Domain proceedings as of the date of filing the petition rather than as of the date of trial. There has not been cited by any party to this litigation at any stage of the proceeding a single case analogous on its facts.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari be denied.

Respectfully submitted,

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December 1959.